

IN THE UNITED STATES ARMY COURT OF CRIMINAL APPEALS

UNITED STATES,
Appellant

v.

FIRST LIEUTENANT (O-2)
SAMUEL B. BADDERS,
United States Army,
Appellee

) REPLY BRIEF IN SUPPORT OF
) GOVERNMENT APPEAL UNDER
) ARTICLE 62, UCMJ
)
) **Docket No. ARMY MISC 20200735**
)
) Tried at Fort Hood, Texas, on 21
) January, 15 and 22–24 September,
) and 19 November 2020 before a
) general court-martial, convened by
) the Commander, 1st Cavalry
) Division, Colonel Douglas K.
) Watkins and Colonel Maureen A.
) Kohn, military judges, presiding.

**TO THE HONORABLE, THE JUDGES OF THE
UNITED STATES ARMY COURT OF CRIMINAL APPEALS**

Issue Presented

**WHETHER THE MILITARY JUDGE ABUSED
HER DISCRETION WHEN SHE GRANTED A
MISTRIAL BECAUSE OF TWO NON-
PREJUDICIAL EVIDENTIARY ERRORS AND A
PANEL MEMBER MEETING WITH OSJA STAFF
DURING A RECESS REGARDING A PRESS
INQUIRY UNRELATED TO APPELLEE’S COURT-
MARTIAL.**

Statements of Statutory Jurisdiction, the Case, and Facts

The government hereby incorporates the statements of statutory jurisdiction, the case, and facts from its brief, filed on 8 April 2021, in support of this appeal pursuant to Article 62, Uniform Code of Military Justice, 10 U.S.C. § 862 [UCMJ].

Law and Argument

A. Appellee commits the same legal error as the military judge.

Appellee repeatedly faults the government—in particular the chief of justice (COJ)—for not disclosing the 23 September 2020 meeting between the staff judge advocate (SJA), deputy staff judge advocate (DSJA), COJ, and Lieutenant Colonel (LTC) [REDACTED]. But nondisclosure of information concerning a panel member does not automatically constitute error warranting relief. In this respect, and in asserting that the military judge did not abuse her discretion when she concluded there was implied bias simply because of government’s nondisclosure of the meeting, (Appellee’s Br. 23), appellee commits the same error as the military judge: he analyzed the nondisclosure alone as a matter of implied bias rather than analyzing whether the information that was not disclosed “constituted grounds for a challenge for cause or [the nondisclosure] otherwise preclude[d] *effective voir dire*.” *United States v. Modesto*, 43 M.J. 315, 316 (C.A.A.F. 1995) (emphasis added). In this case, it did neither. (Appellant’s Br. 35–46).

B. Appellee fails to explain why, after learning of [REDACTED] article, he did not seek to voir dire LTC [REDACTED] on a potential meeting with the OSJA, despite LTC [REDACTED] clear and candid disclosure concerning his work relationship with the OSJA during group and individual voir dire.

Appellee asserts this court should disregard the government's "waiver" argument because it was not raised below. (Appellee's Br. 24). Although the government did not use the talismanic word, "waived," the government did highlight LTC [REDACTED] candid disclosure during voir dire that he responds to press releases concerning [REDACTED] and that he seeks advice from the OSJA on those press releases. (App. Ex. XXXVII; App. Ex. LXIX). Even if the precise argument concerning waiver was not argued before the military judge, this still does not give license to the military judge to fail to recognize and apply the correct law. This court's superior court has clearly stated, "[A] claim of unfairness dissipates if defense counsel could have reasonably discovered the grounds for his untimely challenges and examined these members on them through voir dire." *United States v. Lake*, 36 M.J. 317, 324 (C.M.A. 1993); *United States v. Dunbar*, 48 M.J. 288, 290 (C.A.A.F. 1998) (noting defense counsel's failure to "make reasonable inquiries into the background of the member" given information they already had waived any post-trial complaint concerning that matter).

Appellee acknowledges that LTC [REDACTED] disclosed during voir dire that he meets with OSJA staff in the regular course of his normal duties in responding to press inquiries. Yet he still avers that it was not "reasonable" for appellee to

consider the possibility that those regularly occurring meetings would take place during this trial. (Appellee's Br. 24). The government disagrees. Appellee sought to re-open voir dire to question LTC [REDACTED] on statements that he made in a response to [REDACTED]' press inquiry during appellee's court-martial. (App. Ex. LXV, p. 30). It is certainly reasonable to assume that LTC [REDACTED] met with the OSJA in formulating that response because he previously stated *it was his regular course of practice to do so* when responding to press inquiries, (R. at 195–96, 205), and he was *in no way precluded from performing his duties* during the recess in appellee's court-martial. (App. Ex. LXV, p. 23). The SJA, DSJA, and COJ were not assigned counsel detailed to the court-martial at the time of the conversation. Nothing prohibited those individuals from providing legal advice on an urgent matter unrelated to appellee's court-martial. Appellee makes no attempt to distinguish this case from *United States v. Dunbar*, 48 M.J. at 290, or *United States v. White*, ACM 34115, 2002 CCA LEXIS 77, at *21 (A.F. Ct. Crim. App. 8 Mar. 2002), which both held that the failure to disclose information concerning a panel member did not preclude the defense from the right to exercise a challenge because defense counsel possessed sufficient information to voir dire the member, but failed to do so. Even if it did not constitute "waiver," these same facts demonstrate that the government's nondisclosure did not preclude him from conducting any voir dire – let alone "effective voir dire." *Modesto*, 43 M.J. at 316.

C. Appellee mischaracterizes the 23 September 2020 meeting.

In support of his argument that the military judge did not err in finding that the nondisclosure of the meeting and the meeting constituted implied bias, appellee repeatedly characterizes “the topic of the meeting [as] sexual assault” or “sexual assault issues and [appellee’s] commander’s intended response to sexual assault issues in his unit.” (Appellee’s Br. 22, 24). This characterization finds no support in the military judge’s findings of fact or the record. To accept appellee’s assertion, this court would have to conclude that the military judge’s findings of fact that the meeting was “unrelated” to appellee’s court-martial, (App. Ex. LXV, p. 30), and her findings concerning [REDACTED] article, (App. Ex. LXV, p. 24), were clearly erroneous or not supported by the evidence. They were not. This is plainly evident from the testimony from the SJA, (R. at 654–83), and LTC [REDACTED], (R. at 688–723), during the 19 November 2020 Article 39(a), UCMJ, session, [REDACTED] email to LTC [REDACTED] seeking a response to comments made by the Massachusetts members of a congressional delegation that recently visited Fort Hood related to the death of SGT EF, (App. Ex. XXXVII, encl. 4), LTC [REDACTED] email response to [REDACTED] (App. Ex. XXXVII, encl. 4), and the article itself. (App. Ex. XXXII).

D. Grounds for a challenge for cause did not exist.

Appellee acknowledges LTC [REDACTED] professional relationship with OSJA staff was not a per se ground for challenge. (Appellee's Br. 38). Yet, appellee still argues LTC [REDACTED] relationship with the OSJA created grounds for a challenge and cites *United States v. Hamilton*, 41 M.J. 22 (C.M.A. 1994). (Appellee's Br. 38–39). This reliance is misplaced. In *Hamilton*, the Court of Military Appeals (CMA) examined whether a military judge abused his discretion in denying a motion to disqualify an assistant trial counsel based on his “inadvertent . . . social contact” with a panel member during trial in which neither discussed appellant's case. *Id.* at 27. In deciding the issue, the CMA analyzed whether the government “carried its burden to make ‘a clear and positive showing’ that the improper communication from a third person or witness did not and could not operate in any way to influence the decision.” *Id.* (internal quotations omitted) (citation omitted). Thus, *Hamilton* addressed a different issue than the one covered in the military judge's ruling in this case and is of minimal value to this court's analysis.

In contrast, *United States v. Peters*, 74 M.J. 31 (C.A.A.F. 2015), *United States v. Richardson*, 61 M.J. 113 (C.A.A.F. 2005), and *United States v. Downing*, 56 M.J. 419 (C.A.A.F. 2002), directly address whether and when implied bias arises from relationships or interactions between panel members and counsel. (Appellant's Br. 40–41). Neither the military judge nor appellee use the legal

framework provided by these cases. Instead, the military judge and appellee rely merely on “optics” to conclude that LTC [REDACTED] was impliedly biased for meeting with the SJA, DSJA, and COJ during a recess in appellee’s court-martial. (App. Ex. LXV, p. 24–25). Even appellee recognizes the incongruity between the military judge’s findings concerning the meeting itself and the finding of implied bias because of the meeting. (Appellee’s Br. 26) (“The military judge . . . [is] of the opinion that the meeting at issue was merely everyone doing his job, with nothing out of the ordinary, about an “unrelated matter”) (quoting App. Ex. LXV, p. 23–24). This further highlights how her arbitrary conclusion was outside the reasonable range of options arising from the facts.

E. The military judge did not err in her conclusion that there was no unlawful command influence and that LTC [REDACTED] was not biased because of Operation Pegasus Strength and his personal views.

Appellee argues that a mistrial was warranted because the SJA, DSJA, and trial counsel committed actual or apparent unlawful command influence in meeting with LTC [REDACTED] regarding the response to the press release, and thereby deprived appellee of a fair trial. (Appellee’s Br. 39–42). Appellee also argues that a mistrial was warranted because LTC [REDACTED] was biased based on his involvement in Operation Pegasus Strength, his personal views on ‘corrosives’ and the “‘truth’ of sexual assault claims,” (Appellee’s Br. 45), and “his predisposition to believe that

the claim is true without hearing any evidence at all.” (Appellee’s Br. 44–46).

Appellee’s arguments fail.

To be clear, the military judge based her declaration of a mistrial solely on two purported, non-prejudicial evidentiary errors and implied bias arising from the government’s nondisclosure of the 23 September 2020 meeting. The military judge appropriately found that there was no UCI and that LTC [REDACTED] was not biased based on his involvement with Operation Pegasus Strength, his personal views regarding sexual assault in the Army, or his statements in [REDACTED] article. (App. Ex. LXV, p. 21–23, 30). These findings further demonstrate the irrationality of the military judge’s conclusion that LTC [REDACTED] was impliedly biased from his attendance at the meeting. It is simply beyond reason to conclude that LTC [REDACTED] was biased based on the “optics” of meeting with the SJA, DSJA, and COJ, when the subject of that meeting did not concern appellee’s court-martial and was not grounds for a challenge for cause. (App. Ex. LXV, p. 23) (finding no error in declining to interrupt deliberations to voir dire LTC [REDACTED] on [REDACTED] article, and no valid basis for challenge for cause based on the LTC [REDACTED] statements in the article, involvement in Operation Pegasus Strength, or his understanding of the “two levels of truth”). This court should conclude that the military judge abused her discretion in finding there was implied bias because of the government’s nondisclosure of the

meeting and the meeting itself, and that a mistrial was warranted because of the nondisclosure.

F. The military judge further abused her discretion by concluding the two non-prejudicial evidentiary errors, in conjunction with implied bias due to the government's nondisclosure, warranted a mistrial.

As an initial matter, appellee incorrectly states that the government conceded the military judge did not err when she concluded that evidence of concerning single line of text from [REDACTED] to appellee—“(thumbs up emoji) thank you for your service”—was admissible or that [REDACTED] testimony single line of testimony stating she did not believe it was unusual for [REDACTED] to remain in contact with appellee was inadmissible. (Appellee’s Br. 9, 18). For purposes of this appeal, the government assumes and does not concede that testimony concerning the text message was admissible and that [REDACTED] testimony was inadmissible.

Even taken one by one, the purported evidentiary errors did not warrant the drastic remedy of a mistrial. The government case relied heavily on the compelling and testimony of [REDACTED]. The defense case relied upon its cross-examination calling into question [REDACTED] credibility. As for the purported erroneously excluded testimony concerning single line of text message, such exclusion, if error, was harmless given the [REDACTED] testimony that in the same text conversation, she expressed to appellee that she had a “great time” with him,

and defense's ability to cross-examine [REDACTED] on multiple other messages sent by [REDACTED] immediately after and in the months following the night of the alleged assault that indicated she had a positive experience with him and wanted to engage in further consensual activity with him. (App. Ex. LXV, p. 6, 17). Cross-examination on the additional message would have had at most, a *de minimis* impact. Moreover, with respect to [REDACTED] testimony on whether she thought it was unusual for [REDACTED] to remain in contact with appellee, this testimony clearly did not rise to the level of testimony about whether or not [REDACTED] believed [REDACTED] or whether or not, in her view, [REDACTED] was truthful. In light of defense's cross-examination of [REDACTED] regarding her motivations about continuing to contact appellee and later filing a report of sexual assault, [REDACTED] testimony did not likely substantially influence the members.


Appellee's allegations of evidentiary error essentially amount to a claim that appellee's conviction was factually insufficient. Post-trial hearings and motions are an inappropriate forum in which to bring such a claim. *See* Rule for Courts-Martial (R.C.M.) 1104(a)(2) (noting the purpose of a post-trial Article 39(a) session "is to inquire into, and, when appropriate, to resolve any matter *that arises after trial that substantially affects the legal sufficiency* of any findings of guilty or the sentence empowers a military judge") (emphasis added); R.C.M. 1104(b)(1) (stating that among other types of motions, a military judge may entertain "a


motion to set aside one or more findings because the evidence is legally insufficient”¹). The “military judge may [not] become the thirteenth juror Instead . . . [she] may determine only whether the rights of an accused have been prejudiced by legal error -- such as legal insufficiency of the government evidence -- and may not decide the credibility of the witnesses.” *United States v. Griffith*, 27 M.J. 42, 48 (C.M.A.1988). The military judge found that neither of her purported erroneous evidentiary rulings “substantially impacted the legal sufficiency of findings.” (App. Ex. LXV, p. 17, 20). The record supports this finding, and a finding that the errors were not prejudicial. Therefore, the military judge abused her discretion determining that the extraordinary remedy of mistrial was partially warranted due to the purported errors.

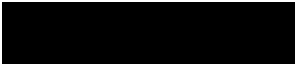
¹ “A finding of guilt is legally sufficient if any rational fact-finder, when viewing the evidence in the light most favorable to the government, could have found all essential elements of the offense beyond a reasonable doubt.” *United States v. Nicola*, 78 M.J. 223, 226 (C.A.A.F. 2019) (citing *United States v. Webb*, 38 M.J. 62, 69 (C.A.A.F. 1993)).


Conclusion

WHEREFORE, the government respectfully requests this honorable court grant its appeal and set aside the military judge's ruling.


ALLISON L. ROWLEY
CPT, JA
Branch Chief,
Government Appellate Division

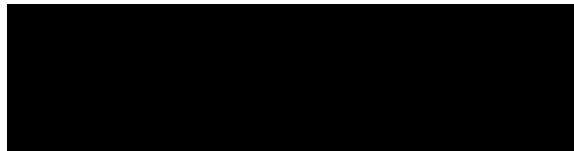

CRAIG J. SCHAPIRA
LTC, JA
Branch Chief,
Government Appellate Division

 LIAMS
LTC, JA
Deputy Chief, Government
Appellate Division


STEVEN P. HAIGHT
COL, JA
Chief, Government
Appellate Division

CERTIFICATE OF SERVICE, U.S. v. BADDERS (Misc 20200735)

I certify that a copy of the foregoing was sent via electronic submission to Ms. Terri Zimmermann and Mr Jack Zimmermann, civilian appellate defense counsel, at *terri.zimmermann@zlslaw.com* and *jack.zimmermann@zlslaw.com*, respectively, and the Defense Appellate Division, at *usarmy.pentagon.hqda-otjag.mbx.dad-accaservice@mail.mil*, on the 4th day of May, 2021.



DANIEL L. MANN
Senior Paralegal Specialist
Government Appellate Division
9275 Gunston Road
Fort Belvoir, VA 22060-5546
(703) 693-0822
Daniel.l.mann.civ@mail.mil